Articles

# The Estado ambiental de derecho under the 'state of siege': COVID-19 and Spanish environmental law

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Abstract

The aim of this essay is to assess the impact of the COVID-19 pandemic on the Spanish legal framework of environmental protection.

Evidence and experience are showing that the current pandemic is deeply rooted in anthropogenic climate change. Despite the evidence, the health crisis has initiated a season of regressive reforms in the Spanish Autonomous Communities that is undermining the Spanish environmental legal system.

This study provides a brief overview of the levels of environmental regulation in the Spanish Autonomic State, while discussing the implications of the two nationwide states of emergency declared so far.

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In light of this regressive trend, the *Estado ambiental de derecho* – so often invoked in Spanish-speaking legal scholarship – is currently under the 'state of siege': that is, the – somewhat paradoxical – restriction of environmental rights, just when the pandemic has demonstrated their utmost importance for the prevention of future zoonotic diseases.

Keywords

Spanish Environmental Law – States of Emergency in Spanish Constitutional Law – Climate Change in the Anthropocene – Zoonotic Pandemics

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## Introduction: the 'spillover' of emergency constitutionalism onto environmental law in the Anthropocene

As recently remarked by Inger Andersen, executive director of the United Nations Environment Programme,[1] the pandemic crisis has dramatically highlighted the close interrelation between anthropogenic climate change and the emergence of zoonotic diseases (75% of newly diagnosed infectious diseases)[2] such as SARS-CoV-2.

[1] United Nations Environment Programme and International Livestock Research Institute, *Preventing the Next Pandemic: Zoonotic diseases and how to break the chain of transmission* (Nairobi, Kenya, 2020) 4.

[2] Ibid.

This health emergency has provided further evidence to prove the correctness of the *Anthropocene Thesis*:[3] the impact of human activity on the Earth ecosystem has long reached geological proportions, creating the conditions for a backlash from nature.

As the world grapples with the pandemic, legal scholars are mostly involved with the restrictions of fundamental rights imposed by the states of emergency declared throughout the globe – and justly so.

However, another *spillover* is currently occurring in the legal arena, which is no less dangerous than the species jump from bats to human lungs. In fact, it can be argued that emergency constitutionalism is *spilling over* environmental law, resulting in *rollbacks*[4] that are causing a 'legal downgrade'[5] of environmental policies and regulations in different legal orders.

According to Amirante, 'we are witnessing to some attempts in using the COVID-19 as "cover-topic" for environmental law downgrades'.[6] This regressive trend is overtly justified by economic concerns about the post-COVID recovery agenda, paradoxically restricting environmental rights just when the pandemic has demonstrated their utmost importance for the prevention of future zoonotic diseases.

Since Spanish local Autonomous Communities (*Comunidades Autónomas*) can enforce their own environmental legislation, Spain represents an interesting case study on the challenges faced by multilevel environmental governance systems in a pandemic stress test.

As a matter of fact, the *Estado ambiental de derecho* – so often invoked in Spanish-speaking legal scholarship[7] – is currently under the 'state of siege': the health crisis has initiated

[3] S. Dalby, *The Anthropocene Thesis*, in M. Juergensmeyer, S. Sassen, M.B. Steger and V. Faessel (eds), *The Oxford Handbook of Global Studies* (OUP 2018); L. Kotzé, *Earth System Law for the Anthropocene*, (2019) 11 Sustainability 23, 6796; L. Kotzé, *Earth system law for the Anthropocene: rethinking environmental law alongside the Earth system metaphor* (2020) 11 *Transnational Legal Theory* 1-2, 75; E. Cocciolo, *Capitalocene, Thermocene and the Earth System: Global Law and Connectivity in the Anthropocene Age*, in J. Jaria-Manzano and S. Borràs (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019); Jaria-Manzano, *Law in the Anthropocene*, in Jaria-Manzano and Borràs (eds), *Research Handbook on Global Climate Constitutionalism* (Edward Elgar 2019); Jaria-Manzano, *La Constitución del Antropoceno* (Tirant lo Blanch 2020).

[4] The term *rollback* has been aptly used to describe how environmental rules were reversed under the Trump administration: see K.H. Engel, *Climate Federalism in the Time of COVID-19: Can the States "Save" American Climate Policy?* (2020) 47 Northern Kentucky Law Review 116, 10. See also N. Popovich, L. Albeck-Ripka and K. Pierre-Louis, *95 Environmental Rules Being Rolled Back Under Trump*, *New York Times* (New York, 21 December 2019).

[5] D. Amirante, *"Tangled up in green": the tight connection between COVID-19 and the environment* (Law on the State of Emergency Conference, Asian Law Centre, Melbourne Law School, The University of Melbourne, 16-17 June 2020) 412.

[6] Ibid.; see also D.R. Boyd, *COVID-19: "Not an excuse" to roll back environmental protection and enforcement, UN rights expert says*, *United Nations High Commissioner for Human Rights News* (Geneva, 15 April 2020); Amnesty International, *Responses to COVID-19 pandemic must not ignore the climate crisis*, *Amnesty International Public Statement* (London, 14 May 2020).

[7] J. Jordano Fraga, *La Administración en el Estado ambiental de Derecho*, (2007) Revista de administración pública 173, 101; G. Mesa Cuadros, *Derechos ambientales en perspectiva de integralidad. Concepto y fundamentación de nuevas demandas y resistencias actuales hacia el Estado ambiental de derecho* (Universidad Nacional de Colombia 2013). See also E. Talancha Crespo, *Hacia un Estado Ambiental de Derecho*, *El Litoral* (Santa Fe, 1 July 2010).

a season of regressive reforms in some *Comunidades Autónomas* (hence CC. AA.) that is lowering national environmental standards under the effect of centrifugal forces.
This entails a further paradox: the intrinsic asymmetry of the distribution of competences – which brought about the advancements of the Spanish environmental legal model – has also generated the rollback phenomena taking place today.
The ultimate aim of this study, therefore, is to assess the impact of the COVID-19 pandemic on the Spanish legal framework of environmental protection through the lens of interlevel conflict.
This paper is comprised of three distinct sections.
The first section provides a reasonably comprehensive overview of the Spanish environmental constitutional and regulatory framework; the second section discusses the implications of the two nationwide states of emergency declared so far, while reviewing their constitutional foundations. The paper ends with a brief analysis of a case study demonstrating how environmental rollbacks are affecting the legal protection of the Mar Menor coastal lagoon in the Region of Murcia.

## 1. The *Estado ambiental de derecho*: the Spanish environmental constitutional and regulatory framework

It has commonly been assumed that the 1978 Spanish Constitution (hereinafter CE) was the first[8] constitutional text to expressly provide for the protection of the environment.
The 1972 Stockholm Declaration was a major influence on the constituent assembly debate on the drafting of Article 45 CE,[9] which consequently bears a striking similarity to its principles and choice of wording.[10]

[8] The closest precedent might be represented by Article 66 of the 1976 Constitution of the Portoguese Republic: 'Everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it (…)'.

[9] J. Gálvez Montes, *Comentario al artículo 45*, in F. Garrido Falla (ed), *Comentarios a la Constitución* (Civitas 2001); see also A.E. Pérez Luño, *Artículo 45. Protección del medio ambiente*, in Ó. Alzaga Villaamil (ed), *Comentarios a la Constitución española de 1978* (Cortes Generales 1996-1999).

[10] Principle 1 of the 1972 Declaration of the United Nations Conference on the Human Environment: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations […]'; cf. Article 45 CE: '1. Everyone has the right to enjoy an environment suitable for personal development, as well as the duty to preserve it; 2. The public authorities shall safeguard rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on essential collective solidarity […]'.

In fact, both provisions enforce the right to 'enjoy an environment' that ensures 'quality of life', 'dignity' and 'well-being', further emphasizing the relationship between natural resources preservation and a dignified human existence.[11]

The body of case law developed by the Constitutional Court of Spain (*Tribunal Constitucional*, hence TC) seems to validate this interpretation: the historical *Sentencia del Tribunal Constitucional* (hereinafter STC) 102/1995[12] clearly stated the *entanglement* of dignity – 'a transcendent constitutional value', enshrined in Article 10 CE[13] – and the 'inalienable right to inhabit the environment'.

The Spanish environmental legal system thus deepens its roots in the Constitution, consistent with the protective purpose – reaffirmed in a recent TC judgment (STC 233/2015)[14] – 'to face degradation phenomena and threats of all kinds that can compromise the survival of natural heritage, […] and […] negatively affect the quality of life itself in human habitats, given their interdependence'.

The legal nature of the 'right to enjoy an environment suitable for personal development' is still debated,[15] due to its vagueness: according to the prevailing interpretation, the right established in Article 45.1 CE can be defined a genuine 'subjective right' (STC 32/1983),[16] but this claim is still highly controversial. Several constitutional decisions have supported the opposite theory, arguing that Article 45 CE represents a 'guiding principle, not a fundamental right' (SSTC 233/2015; 84/2013; 199/1996).[17]

What seems certain is the *teleological dimension* of the constitutional recognition of this right, as an overarching principle which every level of government has to comply with (STC 126/2002).[18]

On the other hand, the implementation and transposition of European principles and ECtHR judgments have given the 'right to enjoy an environment suitable for personal de-

[11] The aforementioned Article 66 of the 1976 Constitution of the Portoguese Republic is, not surprisingly, indexed *Del ambiente y la calidad de vida*.

[12] Sentencia del Pleno del Tribunal Constitucional 102/1995, (26 of June 1995)

[13] Article 10 CE: '1. The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace; 2. The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain'.

[14] Sentencia del Pleno del Tribunal Constitucional 233/2015 (5 November 2015).

[15] F.S. Yarza, *Medio Ambiente y derechos fundamentales* (CEPC Tribunal Constitucional Madrid 2012), 359; F. Delgado Piqueras, *Régimen jurídico del derecho constitucional al medio ambiente* (1993) 38 Revista española de derecho constitucional, 53; B. Lozano Cutanda, *Derecho ambiental: algunas reflexiones desde el derecho administrativo* (2016) 200 Revista de Administración Pública, 420;

[16] Sentencia *del Pleno del Tribunal Constitucional 32/1983, de 28 de abril*: 'The right (…) to enjoy an environment suitable for personal development belongs to all Spaniards and the basic conditions for its exercise are equally guaranteed to all by the State'.

[17] Cf. Lozano Cutanda (n 16) 421.

[18] Sentencia del Pleno del Tribunal Constitucional 126/2002 (20 of May 2002)

velopment' considerable substance, through the enforcement of the connected rights to physical integrity and privacy.[19]

Article 149.1.23 CE[20] lays the foundation of the multilevel architecture of Spanish environmental governance, as it articulates the allocation of competences between the State and the CC. AA.

The aforementioned article establishes the exclusive competence held by the State over 'basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to establish additional protective measures'.

At State level, basic legislation provides wide frameworks that often incorporate principles developed by international and European institutions; on the other hand, CC. AA. can achieve a higher level of detail in the exercise of their conferred competences.[21]

Basic legislation must leave sufficient room for subnational regulations to thrive, while setting minimum standards to be met in any case; of course, the CC. AA. are allowed to establish higher levels of protection (SSTC 170/1989; 118/2017).

Drawing a clear demarcation line is not always so easy: the complex and 'multifaceted'[22] features of environmental protection can produce overlapping and potential conflict between central and local competences, given their transversal nature.

According to constitutional rulings, the distribution of competences is violated when State basic legislation entails more than just establishing limits for local actors, with one relevant exception: the *supraterritoriality* clause.

Defined in STC 22/2014 as the exceptional attribution of local powers to the State, supraterritoriality can be invoked under two conditions: first, a state of exception, justified by necessity and urgency; secondly, the alleged impossibility of introducing coordination and equal distribution of competences.

Before proceeding to the actual inquiry into the role played by the supraterritoriality clause during the pandemic, it seems necessary to briefly review the most relevant statutes

[19] ECtHR Judgment *López Ostra v Spain* App no 16798/90 (ECtHR, 9 December 1994) broke new ground in this regard, both in Spain and abroad; *Guerra and Others v Italy* 116/1996/735/932 (ECtHR, 19 of February 1998); *Hatton v UK* App no 36022/97 (ECtHR, 8 of July 2003). See also C. Ruiz Miguel, *La CEDH et l'Espagne: statut juridique, pratique et signification* (2020) 43 DPCE Online 2.

[20] Article 149 CE: '1. The State holds exclusive competence over the following matters […]; xxiii) basic legislation on environmental protection, without prejudice to the powers of the Autonomous Communities to establish additional protective measures; basic legislation on woodlands, forestry, and livestock trails'.

[21] It should be reminded that the CC. AA. have adopted their own basic institutional laws, the Statutes of Autonomy, in accordance to Article 147 CE: '1. Within the terms of the Constitution, the Statutes shall constitute the basic institutional rules of each Autonomous Community and the State shall recognise and protect them as an integral part of its legal order; 2. The Statutes of Autonomy must contain: […] the powers assumed within the framework established by the Constitution and the basic conditions for the transfer of the services corresponding to them'.

[22] J. Sanz Larruga, *Situación actual y nuevas perspectivas del derecho ambiental de Galicia. La normativa ambiental básica del Estado: evolución, contenidos y nuevas tendencias* (2009) 5 Actualidad Jurídica Ambiental; see also the aforementioned *Sentencia del Pleno del Tribunal Constitucional 118/2017, de 19 de octubre*.

enacted in Spain on environmental matters, although their extended discussion is beyond the scope of this paper.

Statal legislation can be summarized in terms of environmental protection techniques.

*Demanialization* (ie the establishment of the State public domain)[23] has represented one of the most effective techniques for the protection of environmental common goods, in accordance with Article 132.2 CE.[24] This is evident in the case of continental waters: water resources belong to the public domain since the entry into force of the *Leyes de Aguas* (1866 and 1879). The complete demanialization of continental waters was confirmed by the *Ley 29/1985, de 2 de agosto, de Aguas*, as reformed by the *Real Decreto Legislativo 1/2001* (*Texto Refundido de la Ley de Aguas* or TRLA).

The *Ley 22/1988, de Costas* and the *Ley 43/2003, de Montes* have similarly stated that coastal areas and communal forests are part of the public domain.

The framework for integrated pollution prevention and control has been laid down by the *Ley 16/2002, de 1 de julio, de Prevención y Control Integrados de la Contaminación* and the *Ley 22/2011, de 28 de julio, de residuos y suelos contaminados*, as reformed by the *Real Decreto Legislativo 1/2016*. Its purpose, as stated in Article 1, is to 'prevent or […] reduce and control atmospheric, water and soil pollution, by establishing an integrated pollution prevention and control system, in order to achieve a higher protection of the environment as a whole'.

An *autorización ambiental integrada* (integrated environmental authorization) is a mandatory legal requirement for the opening of industrial sites. The autonomous communities shall appoint the competent bodies, responsible for deciding whether or not to grant environmental authorizations, in accordance with the principles set out in Article 4 (prevention of contamination, prevention and management of wastes, energy efficiency, accident prevention).

The national law on environmental impact assessment is the *Ley 21/2013, de 9 de diciembre, de evaluación ambiental*, which establishes uniform rules throughout national territory, pursuant to the aforementioned Article 149.1.23 CE.

According to Article 5, environmental assessment is the 'instrumental administrative procedure for the approval or adoption of plans and programs, as well as for the authorization of projects or […] for the administrative […] control of projects subject to […] prior notice, through which the potential significant effects on the environment […] are analyzed'. The

[23] According to the *Sentencia del Pleno del Tribunal Constitucional 227/1988, de 29 de noviembre*, demanialization is: 'a technique primarily aimed at excluding the asset involved from private legal trade, protecting it through a series of exceptional rules deviating from private law. The property in the public domain is thus above all a *res extra commercium*'.

[24] Article 132 CE: '1. The legal system governing public domain and community property shall be regulated by law, on the principle that they shall be inalienable and imprescriptible and not subject to attachment or encumbrance; 2. The property of the State public domain shall be that established by law and shall, in any case, include coastal area, beaches, territorial waters and natural resources of the economic zone and the continental shelf; 3. The State and National Heritage, as well as their administration, protection and preservation, shall be regulated by law'.

competent bodies have the power to impose sanctions for those projects that do not comply with environmental impact assessment.

The rights to access to information, public participation and access to justice in environmental matters are enforced by the *Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente*.[25] In accordance with the established case law of the European Court of Justice,[26] Title II enacts a distinctly open regime for the dissemination of environmental information. Title III requires that any decision of a public authority related to the environment implies public participation, while Title IV creates specific access procedures for justice and administrative protection in environmental matters.

The *Ley 26/2007, de 23 de octubre, de Responsabilidad Medioambiental*, as reformed by the *Ley 11/2014*, outlines unlimited environmental responsibility, based on the prevention and polluter pays principles.

In consonance with the principle of *liability without fault*, the legal nature of this responsibility is defined as strict liability (*responsabilidad objetiva*): regardless of any subjectivity of the fault, the responsible party must restore damaged natural resources to their baseline condition.

The notion of relevant environmental damage comprises any deleterious and measurable change of a natural resource, whether direct or indirect, such as the degradation of air, water and soil, the disturbance to ecosystems and the extinction of wildlife.

Below the State level, the competent authorities of the 17 CC. AA. have further powers on environmental matters, granted by their *Estatutos de Autonomía* (Statutes of Autonomy);[27] even municipalities have autonomous environmental powers, recognized according to the *Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local* (LRBRL, as reformed by the *Ley 57/2003, de 16 de diciembre, medidas para la modernización del Gobierno Local*).[28] The complete analysis of subnational legislation is well beyond the scope of this study.

Interestingly, with regard to the impacts of climate change, Cocciolo remarked that the years between 2012 and 2018 were characterized by the substantial inactivity of the central

[25] The adoption of this law transposes Directive 2003/4/EC of 28 January 2003 on public access to environmental information and Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

[26] Case C-233/00 Commission of the European Communities v French Republic [2003] ECR I-04395.

[27] For the in-depth analysis of the environmental provisions enacted in the *Estatutos de Autonomías* see A. Nogueira López, *A Rolex o a setas. Comunidades Autónomas, cambio climático y modelo económico* (2020) 11 Revista Catalana de Dret Ambiental 1, 4-5.

[28] Article 25.2 LRBRL: 'The Municipality shall exercise […] its own powers, within the framework of State and Autonomous Communities' legislation, over the following matters: […] b) Urban environment: in particular, parks and public gardens, management of urban solid waste and protection against noise, light and atmospheric pollution in urban areas'.

government.[29] This *inactividad climática* was nevertheless compensated by the legislative activity of the CC. AA., leading towards an alleged *climate federalism*,[30] up for the challenges of energy transition and climate change.

Therefore, three laws have been approved: the *Ley del Parlamento de Cataluña 16/2017, de 1 de agosto, del cambio climático*; the *Ley del Parlamento de Andalucía 8/2018, de 8 de octubre, de medidas frente al cambio climático y para la transición hacia un nuevo modelo energético en Andalucía*; the *Ley del Parlamento de las Illes Balears 10/2019, de 22 de febrero, de cambio climático y transición energética*.

These three bills share the same *bottom-up approach* advocated by the Paris Agreement on Climate Change of 2015, establishing a decentralized line of action to fulfill the Agreement's long-term temperature goals.

The Catalan *Ley 16/2017* pursues the goal of reducing greenhouse gas emissions, devising instruments to achieve energy transition towards full carbon neutrality. Its preamble states that 'in terms of competence, this law is a substantially environmental act. Its object and its purposes inevitably give it this character'. Albeit 'the competence in environmental protection is a shared competence', basic State legislation (Article 149.1.23) cannot 'prevent the *Generalitat* from establishing its own policies in this area' or undermine autonomic competence (*punto III preámbulo*). The wording of the preamble reflects the historical moment of tension in Catalonia's relationship with Spain;[31] from a regulatory standpoint, the following articles thoroughly outline advanced *philoclimatic* principles and guidelines, but have drawn criticism for their lack of concrete measures and continued reference to future regulations.[32]

Notwithstanding, the law was challenged and upheld by the TC for unconstitutionality. It was alleged that the Catalan Law invaded the exclusive competences of the State in matters of basic legislation on environmental protection and energy policy (Article 149.1.13, 149.1.23 and 149.1.25 CE).

[29] E. Cocciolo, *Cambio climático en tiempos de emergencia. Las comunidades autónomas en las veredas del "federalismo climático" español*, (2020) 11 Revista Catalana de Dret Ambiental 1.

[30] Ibid. 14.

[31] On the topic of the Catalan constitutional conflict see G. Poggeschi, *La Catalogna: dalla nazione storica alla repubblica immaginaria* (2018 Editoriale Scientifica); Poggeschi, *La definitiva approvazione del nuovo statuto di autonomia della Catalogna. Un passo avanti verso una maggiore asimmetria nell'Estado autonómico?* (2006) 3 DPCE, 1340.

[32] A. de la Varga Pastor, *Estudio de la Ley catalana 16/2017, de 1 de agosto, del cambio climático, y comparativa con otras iniciativas legislativas subestatales*, (2018) 9 Revista Catalana de Dret Ambiental 2, 52.

STC 87/2019[33] declared all references to the aforementioned emission limits unconstitutional, establishing the primacy of 'a rigid and *top-down* conception'[34] of European competition principles, with blatant disregard for the Paris Agreement.[35]

Most of the provisions of the Andalusian *Ley 8/2018* are directory. The Andalusian law does not draw mandatory parameters or a clear set of climate change targets, outlining instead a very complex regulatory architecture that involves too many actors. To date, there has been no clear development or funding of these measures.[36]

In addition, *Ecologistas en Acción* have contested the bill for having 'suspended Paris' by not adhering to the emission reduction target of 40% and by misleadingly comparing the 2030 goal to the emission level of 2005, instead of the year 1990 (to which both the Kyoto Protocol and the Paris Agreement refer).

Mora Ruiz explicitly referred to the impact of this law as 'decaffeinated',[37] due to its lack of specificity.

Nogueira López has aptly highlighted the importance of the 'learning process'[38] derived from STC 87/2019: as a result, the Balearic *Ley 10/2019* has settled the distribution of competence with a comprehensive explanatory memorandum. In an attempt to avoid a declaration of unconstitutionality akin to that of the Catalan *Ley 16/2017*, the Balearic law insists on the proportionality of its measures, without setting any quota for reducing greenhouse gas emissions.

As of December 2020, the national *Proyecto de Ley de Cambio Climático y Transición Energética* (PLCCTE) – submitted to the *Cortes Generales* on May – is still suffering from delays and will not be discussed until next March. The Spanish Climate Change Law has accumulated years of delay and more than 700 amendments. It is but one of the three pillars of the *Marco Estratégico de Energía y Clima* (MEEC), along with the *Estrategia de Transición Justa* and the *Plan Nacional Integrado de Energía y Clima* (PNIEC) 2021-2030.

[33] A. de la Varga Pastor, *La ley catalana de cambio climático tras la sentencia del Tribunal constitucional. Estudio de las repercusiones de la sentencia y su evolución legislativa*, (2020) 11 Revista Catalana de Dret Ambiental 1.

[34] Cf. Nogueira López (n 27) 25.

[35] S. Simou, *La configuración filoclimática del derecho de propiedad* (2017) 3 InDret. S. Galera Rodrigo, *Las competencias en materia de clima: La complejidad jurídica del gobierno multinivel*, in Galera Rodrigo and Mar Gómez Zamora, *Políticas locales de clima y energía. Teoría y práctica* (INAP 2018), 227-29; Nogueira López, *Cuadrar el círculo. El complejo equilibrio entre el impulso de la economía circular y un proceso de liberalización ambicioso* (2019) 3 InDret.

[36] M. Mora Ruíz, *La respuesta legal de la Comunidad autónoma de Andalucía al cambio climático: estudio sobre la Ley 8/2018, de 8 de octubre, de medidas frente al cambio climático y para la transición hacia un nuevo modelo energético en Andalucía* (2020) 11 Revista Catalana de Dret Ambiental 1.

[37] Ibid. 10.

[38] Cf. Nogueira López (n 27) 8.

The *Proyecto* has already been criticized for not taking into consideration the paradigms of circular economy and not seizing the chance to tax GHG emissions,[39] but it can still be considered a step forward in the direction of a decarbonized economy.
A process that has been abruptly halted by the global pandemic and the subsequent declaration of the state of emergency.

## 2. *Estado de derecho y estado de alarma*: the Spanish Autonomic State in the time of COVID-19

Spanish emergency constitutionalism – and its ability to meet the challenges of the pandemic crisis – have already been the subject of much investigation: a comprehensive review would thus be beyond the constraints of this study.
However, a number of fundamental provisions must be briefly illustrated here.
Article 116 CE[40] represents the cornerstone of the Spanish constitutional framework for emergency situations, listing the *estados excepcionales* in order of increasing restrictions on basic freedoms: the *estado de alarma* (state of alarm, paragraph 2), the *estado de excepción* (state of emergency, paragraph 3) and the *estado de sitio* (state of siege, paragraph 4).
Article 116 does not exhaust the definition of these states of exception, referring back to an organic law for the regulation of their conditions, competences and limitations.
The promulgation of *Ley Orgánica 4/1981, de 1 de junio, de los estados de alarma, excepción y sitio* – hence LOAES – has filled the gap by providing the guiding principles and the legal regime of the states of emergency.

[39] A. Pallares Serrano, *Análisis del anteproyecto de ley de cambio climático y transición energética: luces y sombras* (2020) 11 Revista Catalana de Dret Ambiental 1, 36; L. Presicce, *Legislación básica de protección del medio ambiente (Segundo semestre 2020)* (2020)11 Revista Catalana de Dret Ambiental 2.

[40] Article 116 CE: '1. An organic law shall regulate the states of alarm, emergency and siege (martial law) and the corresponding competences and limitations; 2. A state of alarm shall be declared by the Government, by means of a decree decided upon by the Council of Ministers, for a maximum period of fifteen days. The Congress of Deputies shall be informed and must meet immediately for this purpose. Without their authorisation the said period my not be extended. The decree shall specify the territorial area to which the effects of the proclamation shall apply; 3. A state of emergency shall be declared by the Government by means of a decree decided upon by the Council of Ministers, after prior authorisation by the Congress of Deputies. The authorisation for and declaration of a state of emergency must specifically state the effects thereof, the territorial area to which it is to apply and its duration, which may not exceed thirty days, subject to extension for a further thirty-day period, with the same requirements; 4. A state of siege (martial law) shall be declared by absolute majority of the Congress of Deputies, exclusively at the proposal of the Government. Congress shall determine its territorial extension, duration and terms.; Congress may not be dissolved while any of the states referred to in the present article remain in operation, and if the Houses are not in session, they must automatically be convened. Their functioning, as well as that of the other constitutional State authorities, may not be interrupted while any of these states are in operation. In the event that Congress has been dissolved or its term has expired, if a situation giving rise to any of these states should occur, the powers of Congress shall be assumed by its Standing Committee; 6. Proclamation of states of alarm, emergency and siege shall not modify the principle of liability of the Government or its agents as recognised in the Constitution and the law'.

The core principle that guides the enactment of the *estados excepcionales* is the proportionality principle: according to Article 1.2 LOAES 'the measures to be adopted in the states of alarm, emergency and siege, as well as their duration, will in any case be those strictly essential to restore normality. These will be applied in a manner proportionate to the circumstances'. A state of emergency cannot be declared unless 'extraordinary circumstances' render 'maintaining normality through ordinary powers' impossible (Article 1.1 LOAES). In any case, the declaration of the states of alarm, emergency and siege 'does not interrupt the normal functioning of the constitutional powers of the State' (Article 1.3 LOAES).
The three different *estados* offer dedicated solutions to address different needs,[41] within an escalating approach: what follows is a condensed summary of the legal regulation of the *estado de alarma*, as it was most interestingly declared twice during the COVID-19 crisis.
The state of alarm (Articles 4 to 12 LOAES) can be declared during natural disasters, health crises, or severe shortage of essential goods: these catastrophic circumstances share the characteristic of 'political neutrality',[42] as they represent a danger to the physical safety of citizens, but do not directly threaten the established order of the State.
The *estado de alarma* is declared by the Government following a decree of the Council of Ministers. Article 116.2 CE determines the contents of this decree,[43] which 'shall specify the territorial area to which the effects of the proclamation shall apply'. According to the aforementioned constitutional provision, the state of alarm can be declared for a maximum period of fifteen days, which can be extended with the authorization of the lower house of the Congress of Deputies: by way of example, during the first wave of the pandemic – between 14 March and 21 June – the *estado de alarma* was extended six times.
According to Article 11 LOAES, the declaration of the state of alarm can impose restrictions to constitutional rights, including restrictions on the freedom of movement, temporary requisition of assets and rationing of essential goods.
Spanish emergency law was never enforced until December 2011, when the Zapatero government declared the first *estado de alarma* in contemporary Spanish history in response to an air traffic controller strike.
Finally, with the *Real Decreto 463/2020, de 14 de marzo*, the government led by Pedro Sánchez declared a nationwide state of alarm to address the COVID-19 emergency.

[41] V. Álvarez García, *El Coronavirus (Covid-19): Respuestas jurídica frente a una situación de emergencia sanitaria* (2020) 86-87 El Cronista del Estado Social y Democratico de Derecho, 10.

[42] P. Cruz Villalón, *El nuevo derecho de excepción (Ley organica 4/1981, de 1 de junio)* (1981) 2 Revista Española de Derecho Constitucional, 93.

[43] Sentencia *del Pleno del Tribunal Constitucional 83/2016, de 28 de abril* has stated that the system of sources of Spanish emergency law comprises also this government decree, which rises to rank and value of law. See also V. Faggiani, *Los estados de excepción ante los nuevos desafíos: hacia una sistematización en perspectiva multinivel* (2020) 24 federalismi.it, 30; cf. C. Cerbone, *L'esperienza spagnola nella gestione delle emergenze: una democrazia a prova di contagio?*, in F. Niola and M. Tuozzo, *Dialoghi in emergenza* (2020 Editoriale Scientifica), 79.

It has been argued that the aforementioned Royal Decree has transcended the boundaries of the *estado de alarma*, imposing restrictions that more closely reflect the suspensions (Article 55 CE) of the *estado de excepción*:[44] reproducing its content is beyond the scope of this paper, but it is sufficient to refer the suspensions of all commercial, recreational, cultural, educational and religious activities.

Commenting on multilevel governance of the pandemics in the CC. AA., Poggeschi has most aptly highlighted how this decree has achieved a strong 'centralization'[45] of emergency management under the direction of the President of the Government.

The author acutely remarks that 'if at the beginning of the crisis the centralization of competences (…) was assumed according to the emergency logic of a regional state', during the so-called *desascalada* phase federal features have taken over autonomic ones, in the sense of greater collaboration between central government and regional governments'.[46]

In order to face the second wave of the COVID-19 pandemic, the central government has decreed a new national state of alarm on October 25 2020, which was extended until May 2021.

## 3. The *estado de sitio (ambiental)*: environmental 'rollbacks' in the Mar Menor coastal lagoon

It could be argued that another state of emergency has gone largely unreported: a *state of* (*environmental*) *siege*, mainly consisting of a *Law Decree pandemic*,[47] which is generating a negative trend in environmental protection standards amongst the Spanish Autonomous Communities.

More specifically, this section gives an account of the environmental regulatory rollback pushed during the COVID-19 pandemic in the Region of Murcia, while briefly addressing the long-debated question of the Mar Menor coastal lagoon.

The Mar Menor coastal lagoon – part of a Specially Protected Area of Mediterranean Importance (SPAMI) – stands at the crossroads of strong economic interests (intensive irri-

[44] R. Rodríguez Fernández, ¿Estado de Alarma o Estado de *Excepción?* (2020) 9627 Diario La Ley.

[45] Poggeschi, *Le Comunità autonome spagnole di fronte alla crisi Covid-19: una fase di "federalismo autonómico" per la Spagna* (2020) 43 DPCE Online 2. In the environmental field, a '*recentralization*' trend in the allocation of competences has been most aptly noted by L. Casado Casado, *La recentralización de competencias en materia de protección del medio ambiente* (Institut d'Estudis de l'Autogovern Barcelona 2018).

[46] Ibid. 1565: 'In this crisis the role of the Autonomous Communities has been fundamental, and a sort of new cooperative federalism, compared to the asymmetric regionalism which has ruled Spain for decades, is probably emerging, which may be defined "federalismo autonómico"'.

[47] S.M. Álvarez Carreño, *La pandemia de decretos-leyes que ponen en riesgo el medioambiente*, *The Conversation* (Melbourne, 7 July 2020).

gated agriculture, fisheries, coastal tourism) and the need to preserve its delicate marine ecosystem.

The overuse of nitrate fertilizers in agriculture has determined unprecedented eutrophication crises in 2016 and 2019, turning the once called *Crystal Sea* into a *green soup.*[48] The declining state of the Mar Menor represents a most interesting case study in the balancing of economic growth and sustainable development, much to the detriment of environmental protection. This case can demonstrate how the pandemic has been a powerful catalyst for environmental law downgrades.

Not surprisingly, the *Pacto por el Mar Menor* association has denounced that 'the Law Decrees approved during lockdown have cast the shadow of ecocide over the Mar Menor'.

The current regressive trend begun with the *Decreto-Ley 2/2019, de 26 de diciembre, de Protección Integral del Mar Menor*, later converted into the *Ley 3/2020, de 27 de julio, de recuperación y protección del Mar Menor*. Three Law Decrees were adopted by the regional government in the wake of the pandemic: the *Decreto-Ley 3/2020, de 23 de abril*, later converted into *Ley 2/2020, de 27 de julio, de mitigación del impacto socioeconómico del COVID-19 en el área de vivienda e infraestructuras*, the *Decreto-Ley 5/2020, de 7 de mayo*, later converted into *Ley 5/2020, de 3 de agosto, de mitigación del impacto socioeconómico del COVID- 19 en el área de medio ambiente* and the *Decreto-Ley 7/2020, de 18 de junio, de medidas de dinamización y reactivación de la economía regional con motivo de la crisis sanitaria (COVID-19)*.

Much of the criticism that this *Law Decree pandemic* has attracted relates to the exclusion of Parliament from codecision – due to the very nature of emergency decrees – and the alleged influence of the *Confederación Regional de Organizaciones Empresariales de la Región de Murcia* (CROEM). According to Álvarez Carreño, 'a regressive reform, whose spirit contradicts the environmental principles of the European Union, is thus consolidated and we hope it can be challenged before the competent Courts at the first convenient opportunity'; the author also reminds that many associations are already demanding the declaration of its unconstitutionality.[49]

For the sake of clarity, the harmful effects of these provisions have to be jointly examined. There are at least three relevant implications: the potential increase in air and water pollution levels; the sensible reduction of administrative controls; the danger of hasty authorization procedures.

Firstly, the decree allows an increase of the pollution index (comprising production of waste, discharges and emissions) subject to environmental assessment from 15% to 30%. A

[48] R. Salassa Boix, *De la sopa verde al mar de cristal: una propuesta tributaria para la eutrofización del Mar Menor en tiempos de COVID-19*, (2020) 11 Revista Catalana de Dret Ambiental 2.

[49] Álvarez Carreño, *Derecho y políticas ambientales en la Región de Murcia (Segundo semestre 2020)* (2020) 11 Revista Catalana de Dret Ambiental 2.

disappointing setback at a moment when the trend should lead towards a decarbonized, sustainable and less polluting economical model.
Secondly, the environmental assessment of new development plans and urbanization projects is ascribed directly to city councils: the number of inhabitants required to confer this power is reduced from 50.000 to 20.000 inhabitants. Furthermore, the power to exclude specific projects from the obligation to carry out an environmental impact assessment has been granted to the regional government. The already scarce guarantees of an independent and objective evaluation of the projects are diminishing, in light of the responsibilities assumed by city councils in the assessment of new development plans and urbanization projects.
Lastly, said guarantees of adequate and sufficient evaluation are further reduced, by restricting consultation and public information time slots and by offering express authorizations within 30 days for 'unsubstantial' modifications and extensions. Combined with meager financial resources, this could possibly lead to hasty authorizations that worsen negative environmental impacts, instead of preventing them.
Overall, these provisions indicate that the Murcian decrees are favoring short-term private benefits at the cost of the resilience of the existing environmental protection legal framework.
The ecological collapse of the Mar Menor clearly exemplifies the conflicting relationship between private economic freedoms and environmental preservation, a major recurring factor in the legislation examined so far. It can be argued that prioritizing private business profit does not generate greater wealth in the long term. The short-sightedness of the Murcian Government's political agenda becomes more evident if the repercussions of climate change are taken into proper account: the Region of Murcia is one of the most threatened by and vulnerable to the impacts of global warming, as tragically demonstrated by the recent Storm Gloria.

## Conclusion: towards an *autonomic climate federalism*?

Nogueira López has entitled a recent work – already mentioned in this article[50] – *A Rolex o a setas. Comunidades Autónomas, cambio climático y modelo económico*: the well-known Basque joke quoted by the author[51] is a brilliant and fitting metaphor for the inquiry conducted so far.

[50] Cf. Nogueira López (n 27).

[51] Two Basques were scaling the mountains looking for mushrooms when suddenly one of them found a gold Rolex on the ground, sharing the discovery with joy to his friend, he reacted angrily, 'Patxi, let's see if we can focus, are we here for mushrooms or Rolex's?'.

Notwithstanding its limitations, this study has tried to demonstrate how the 'golden sparkle' of the 'emergency Rolex' has sidetracked Spanish policymakers – at both the regional and national level – from foraging the 'mushrooms' of climate change management, laying at the very root of the pandemic crisis. The severe level of endemic interlevel conflict – intrinsically linked to the Spanish model of *competitive regionalism*[52] – has highly contributed to this 'distraction'.

The Spanish environmental legal framework is, in fact, extremely complex: its openness and flexibility borders on indeterminacy, especially in the definition and division of shared competences between the State and the Autonomous Communities.[53] Besides, Spanish 'constitutional and statutory mosaic' does not provide 'an adequate system of institutional relations',[54] making it extremely difficult to overcome the '*dinámica de litigios competenciales*'[55] and to establish multilevel cooperative strategies.[56]

Nevertheless, in recent years the CC. AA. played a crucial role in the implementation of environmental policies, putting climate change back at the center of the national political agenda. As Nogueira López reminds, decentralization is a positive factor that could potentially help legal experimentation and testing of best practices, in line with the European Committee of the Regions' encouragement addressed to regions and cities to guide the gradual transition towards the new systemic model and test new solutions before 2030. This vision of regionalism and municipalism as 'laboratories of democracy and experimentalism'[57] points towards the development of a proper '*autonomic climate federalism*', founded on the European principles of cooperative federalism. A *supraterritoriality clause* – akin to the one developed by the case law of the TC, described earlier – could (and should) be invoked in case of circumvention of minimum environmental standards.

The pandemic has shown that the Spanish model allows a certain fluidity between centralized government and autonomic management.

Once a proper understanding of the similarities[58] between environmental and health crises is gained and diffused, the denounced rollback phenomena will be – hopefully – more readily contained.

[52] Cf. Poggeschi (n 45).

[53] M. Alberton, *La praxis de las relaciones intergubernamentales en España: un examen cuantitativo y cualitativo de la cooperación en materia ambiental* (2020) 11 Revista Catalana de Dret Ambiental 2.

[54] Ibid. 4.

[55] Cf. Nogueira López (n 27) 28.

[56] R. Galera, *Políticas locales de clima: una razón (adicional) para renovar la planificación (¿local?) en España*, in M. Bassols Coma, J. Gifreu i Font and Á. Menéndez Rexach (eds), *El derecho de la ciudad y el territorio. Estudios en homenaje a Manuel Ballbé Prunés* (INAP 2016), 490-93.

[57] M. Ballbé, *El futuro del Derecho administrativo en la globalización: entre la americanización y la europeización*, (2007) 174 Revista de Administración Pública, 259.

[58] P. Villavicencio Calzadilla, *La pandemia de COVID-19 y la crisis climáticas: dos emergencias convergentes* (2020) 11 Revista Catalana de Dret Ambiental 1.